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# GST and Land Tax:  Issues for Property Lawyers

## Legalwise 11th Annual Property Law Conference 2020

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Principal

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# Overview

- GST updates
  - DPN and estimates regime now applies to GST
  - GST withholding
- GST risk
  - higher risk scenarios
  - GST basics
- Drafting GST clauses in contracts
- Land tax
  - land tax basics
  - property lawyers advising clients

# GST updates

- Improving ATO's ability to collect GST revenue
  - extending estimates regime to cover GST (effective 1 April 2020)
  - extending director penalty regime to cover GST (effective 1 April 2020)
  - PCG 2019/D4 – examples and details of when estimates and DPNs will issue:
    - history of establishing, abandoning and de-registering companies with unpaid taxes etc
    - directors associated with prior liquidations, de-registrations or prior insolvencies
    - evidence of assets being sold
    - failure to lodge and pay activity statements and income tax returns by due dates
    - failure to return phone calls, respond to ATO correspondence,
    - failing to respond within ATO timeframes (as little as 3 business days)
  - GST withholding regime (effective 1 July 2018)

# GST risk

- Lawyers – document agreements, resolve disputes
- GST operates independent of any contract or legal document
- Understand the factual circumstances
  - whether supplier carrying on an enterprise?
  - is the supply of property part of an enterprise, or private in nature?
  - is there more than one supply under the proposed arrangement?
    - intangible – rights
    - tangible – goods, services
    - supplies in both directions – barter supplies etc
- Inherent tension – GST borne by supplier, but often passed on to the recipient

# GST risk

- Risk to both parties – identifying:
    - correct suppliers, recipients & their GST status – registered or required to be registered
    - all possible supplies (by supplier and recipient)
    - the appropriate GST treatment for each supply/type of supply
- Recipient's risk - whether supplier:
    - continues to be registered for GST
    - will remit money to ATO to enable ITCs to be claimed
    - will issue valid tax invoice to claim ITC
- Documenting appropriate clauses – protect client's interests if different circumstances arise

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# GST – higher risk scenarios

- Transactions involving:
  - property developers
  - intended or possible change of use
  - complex circumstances – multiple suppliers, multiple types of supplies
  - non-cash consideration, barter transactions
  - the appropriate GST treatment for each supply/type of supply
  - consideration being paid in stages
  - supplies of properties as going concerns, which are then used to make input taxed supplies
- Transactions differing to standard circumstances:
  - sale of lot intended for commercial use within a residential subdivision
  - sale of new residential premises to GST registered buyers

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# GST basics – GST status of supplier

- GST treatment – dependent on:
  - status of supplier
  - type of supply made
- Required to be registered:
  - carrying on an enterprise (an activity, or series of activities; MT 2006/1)
  - GST turnover meets the registration turnover threshold
- Registered – ABN register
- Supplies for consideration
  - monetary v non-monetary consideration
  - ‘barter transactions’

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# GST basics – GST turnover

- GST turnover thresholds
  - $75,000 turnover – most entities
  - $150,000 turnover – not for profits
  - current and projected turnover
  - excludes proceeds of capital assets, including on cessation of enterprise

# GST basics – types of supplies

| Supply | Example | GST Payable | Input tax credit |
|---|---|---|---|
| Taxable supply (default position) | • New residential premises<br>• Commercial leasing<br>• Sale of commercial premises | Yes | Yes |
| Input taxed supply | • Existing residential premises<br>• Residential leasing | No | No |
| GST free supply | • Going concerns<br>• Farmland | No | Yes |

# GST basics – mixed supplies (GSTR 2001/8)

- Mixed supplies – more than one type of supply under an arrangement
  - development stock for sale v development stock for rent
  - sale of farm – GST-free going concern, GST-free water rights, GST-free farmland, input taxed residence
- Composite supplies – dominant supply and ancillary supplies
- Apportionment (GSTR 2001/8)
  - arms' length basis
  - can use any fair and reasonable methodology
  - commonly used methodologies for property transactions:
    - area basis
    - rental income

# GST basics – tax invoices and input tax credits

- GST – intended to be borne by end consumer
- Mechanism – input tax credits can be claimed on creditable acquisitions
  - tax period in which any consideration is provided for the acquisition **or**
  - if before consideration is paid, the period in which a tax invoice is issued
- Tax invoices (section 29-70, GSTR 2013/1):
  - name, address and ABN of supplier
  - name, address and ABN of recipient (if supply value > $1,000)
  - labelled ‘tax invoice’
  - sufficient details to identify supplies, including taxable supplies, and value of each
  - date on which document was issued
  - must be provided within 28 days of request by the recipient
- Some flexibility to overlook oversights – sections 29-70(1A) and (1B)

# GST basics – margin scheme

- Benefits of margin scheme and when to use
  - timing difference only that aids cashflow and reduces duty
  - ideally residential land only (ie ultimate recipient will not claim input tax credit)
- Eligible land
  - look back through previous acquisitions
  - general rule – only applicable if:
    - previous supplies not subject to GST or
    - if subject to GST, then margin scheme applied

# GST basics – margin scheme

- Agreements to apply margin scheme – examples:
  - default position, but 'unless otherwise agreed in writing'
  - 'if land is eligible for margin scheme to apply then parties agree…'
- Extension of time to agree (PS LA 2005/15)
- Documenting decisions
  - Form 24s – does GST apply to transaction and if so, whether margin scheme applies

# GST basics – going concerns

- Identifying actual enterprise being carried on
  - business enterprise v ancillary leasing or licensing enterprises
  - suppliers of each
  - all things necessary for supply of each enterprise (eg supply business enterprise, then leasing enterprise)
- Implementing all things necessary prior to time of supply, eg lease
- Ensuring same enterprise continues and does not cease
- Div 135 clawback – recipient becomes directly liable for GST if GST-free acquisition used to make input taxed supply – caravan parks, retirement villages

# GST – drafting appropriate clauses

- **GST inclusive** clauses – unregistered recipients/private acquisitions
- **GST exclusive** clauses – registered recipients
- Careful drafting required – *South Steyne*
- Warranties – usually inserted to ensure respective parties meet specific requirements of any GST exemptions or concessions,
- Example: Going Concern warranties:
  - Recipient warrants it is registered or required to be registered
  - Supplier warrants it will:
    - Supply all things necessary for continued operation of enterprise; and
    - Carry on enterprise until day of supply

# GST – drafting appropriate clauses

- Cascading clauses
  - **not registered for GST**
  - **if required to be registered,** then parties acknowledge and agree **GST going concern** (to extent things supplied are used and continued to be used in an enterprise)
  - notwithstanding going concern, parties acknowledge GST-free supplies – **farmland, water** etc
  - if for any reason a supply is a taxable supply then parties agree **margin scheme** will apply to supplies of eligible land
  - to the extent any part of the land is used for residential accommodation then supply will be **input taxed**
  - if **taxable supply** then:
    - Recipient to pay an amount equal to the **GST amount** in the same manner as the consideration
    - **Timing** of payment of GST amount – only when Supplier issues a valid tax invoice
  - **general warranty** – if supplier issues a tax invoice for a taxable supply, then the Supplier warrants it will remit the GST amount to the ATO

# Land tax basics – rates and thresholds

- Tax attaching to land, assessed at 30 June each year
- Based on unimproved values
- Tax free thresholds and rates
  - $600,000 for individuals
  - $350,000 for companies, trusts and absentees
  - cascading rates up to 2.75%
  - 2% land tax surcharge for absentees
- Separate tax free threshold for:
  - co-owners (if less than five co-owners)
  - companies/trusts (no aggregation in Qld)

# Land tax basics – exemptions and strategies

- Exemptions generally turns on eligible ownership and eligible use
  - Home (including trustees)
  - Primary Production
  - Charitable
  - Subdividers discount (40%)
  - Aged care facilities
  - Retirement villages
  - Moveable dwelling parks
- Strategies:
  - seek input before property is acquired
  - understand intended and actual use
  - understand any change in circumstances
  - determine if land tax can be passed to tenant under lease for commercial property

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# Land tax – property lawyers advising clients

- Flag land tax as an issue for client to consider
- Leasing matters
  - review outgoings clauses
    - is land tax included?
    - time limits for recoupment?
    - Basis for recoupment – calculation – company v individual owner etc
  - Assignment
    - due diligence enquiries (understand if circumstances different)
- Conveyancing matters
  - suggest client seeks expert advice re ownership structure
  - apportionment clauses (no legislative basis, must be contractual)
  - ensuring purchaser knows to lodge exemption forms if eligible

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